90-1433

No. _____

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
October Term, 1990

THE STATE OF FLORIDA,

Petitioner,

vs.

JOSEPH TRODY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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QUESTION PRESENTED

WHETHER INVOCATION OF SIXTH AMENDMENT RIGHT TO COUNSEL AT A JUDICIAL PROCEEDING AUTOMATICALLY TRIGGERS FIFTH AMENDMENT PROTECTIONS WITH REGARD TO UNRELATED AND UNCHARGED OFFENSES?

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No. _____

IN THE

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October Term, 1990

THE STATE OF FLORIDA,

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JOSEPH TRODY,

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

OPINIONS BELOW

The opinion of the Supreme Court of Florida is not reported. (Pet.App. A-1).

The opinion of the District Court of Appeal of Florida, Third District is reported at 559 So.2d 641 (Fla. 3d DCA 1990). (Pet.App. A-2).

The trial court's order denying the motion of Respondent Joseph Trody to suppress evidence is not reported. (Pet.App. A-5).

JURISDICTION

The Supreme Court of Florida's opinion declining jurisdiction was filed on December 7, 1990. This Court has jurisdiction. 28 U.S.C.A. Section 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Amendment V, United States Constitution, provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI, United States Constitution, provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory proces for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment XIV, Section I, United States Constitution, provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or

immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article I, Section 9, Florida Constitution, provides:

No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against himself.

Article I, Section 16, Florida Constitution, provides:

(a) In all criminal prosecutions the accused shall, upon demand, be informed of the nature and cause of the accusation against him, and shall be furnished a copy of the charges, and shall have the right to have compulsory process for witnesses, to confront at trial adverse witnesses, to be heard in person, by counsel or both, and to have a speedy and public trial by impartial jury in the county where the crime was committed.

STATEMENT OF THE CASE

The Respondent Joseph Trody was the Respondent before the Supreme Court of Florida and was the Appellant before the District Court of Appeal of Florida, Third District.

On May 25, 1988, Trody was arrested and charged with two counts of burglary and two counts of grand theft for two separate burglaries (Pet.App. A-3). At the time of the arrest, Trody volunteered to detectives that he was willing to talk to them about other, unrelated burglaries he had committed (Pet.App. A-3). The detectives did not speak to Trody at that time (Pet.App. A-3).

The following day, May 26, 1988, Trody was arraigned and appointed Sixth Amendment counsel for the two aforementioned burglaries (Pet.App. A-3). He signed a Notice of Defendant's Invocation of the Right to Counsel, which is a form document that states in pertinent part:

> I, Joseph H. Trody, hereby invoke and exercise my right to counsel pursuant to the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 9,12 and 16 of the Florida Constitution and the case law thereunder. That is to say that I desire to have my attorney, the Public Defender, present before and during any questioning of, interviewing of, and/or conversations with me by any police official and/or agents thereof, any prosecutors and/or agents thereof, any judicial officer and/or agents thereof. I hereby announce that I desire my attorney present before anybody talks to me about any matters relating to this case or any criminal charge pending or contemplated....

(Pet.App. A-11).

On the same day, May 26, 1988, Trody was charged with two more burglaries as a result of fingerprint comparisons (Pet.App. A-3). The next day, May 27, 1988, Trody, appearing before the court for a bond hearing on the new charges, was appointed counsel and signed another right to counsel form (Pet.App. A-3).

On May 31, 1988, the detectives visited Trody in jail to charge him with two additional counts of burglary and grand theft (Pet.App. A-3). At that time, Trody signed a waiver of his constitutional rights and informed the detectives that he had committed other unrelated burglaries (Pet.App. A-3). The detectives did not speak further to Trody that day (Pet.App. A-3).

The following day, June 1, 1988, Trody was arraigned on the May 31, 1988 charges (Pet.App. A-3). Trody invoked his Sixth Amendment right to counsel by signing another Notice of Defendant's Invocation of the Right to Counsel, identical to the previous ones (Pet.App. A-3, A-11).

On June 2, 1988, the detectives visited Trody in jail (Pet.App. A-3). Trody once again signed a waiver of his constitutional rights and told detectives about other burglaries he had committed, burglaries unrelated to the ones for which he had been already charged (Pet.App. A-3). The detectives then drove Trody around the city so that Trody could point out the location of these other burglaries (Pet.App. A-3). The drive led to Trody being charged with nineteen additional counts of burglary and twenty counts of grand theft (Pet.App. A-4).

Trody moved to suppress the evidence regarding the thirty nine additional charges on the basis that the evidence was obtained from him after the invocation of his right to counsel (Pet.App. A-4). The trial court, in reliance on numerous cases, including *Patterson v. Illinois,* 487 U.S. 285, 108 S.Ct. 2389, 101 L.Ed.2d 261 (1988), *Edwards v. Arizona,* 451 U.S.

476, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981) and *Arizona v. Roberson,* 486 U.S. 675, 108 S.Ct. 2093, 100 L.Ed.2d 704 (1988), held that notwithstanding the fact that Trody had on three separate occasions signed the right to counsel form, the Defendant had voluntarily initiated communications with the police and had executed a valid waiver of his constitutional rights (Pet.App. A-6, A-7). The trial court then denied the motion to suppress filed by Trody (Pet.App. A-6). Trody pled nolo contendere to the thirty nine counts, reserving his right to appeal the denial of the suppression motion (Pet.App. A-2).

The Respondent appealed this decision to the District Court of Appeal of Florida, Third District. That court reversed the denial of the motion to suppress (Pet.App. A-5). The court interpreted the rule in *Arizona v. Roberson, supra,* to stand for the proposition that where a waiver, signed after the invocation of the right to counsel in a judicial proceeding, "is done 'at the authorities behest and not at the suspect's own instigation,' such a waiver is not purely voluntary" (Pet.App. A-5). The court found that the detectives had initiated each contact with Trody while Trody was in custody and reasoned that, therefore, the waivers were invalid (Pet.App. A-5).

The State then petitioned the Supreme Court of Florida for discretionary review based on the conflict with the Florida Supreme Court case of *Kight v. State,* 512 So.2d 922 (Fla. 1987), *cert. denied,* 485 U.S. 929, 108 S.Ct. 1100, 99 L.Ed.2d 262 (1988) and the United States Supreme Court cases of *Arizona v. Roberson, supra,* and *Illinois v. Perkins,* — U.S. —, 110 S.Ct. 2394, 110 L.Ed.2d 243 (1990). The Supreme Court denied the State of Florida's Petition for Review, declining to accept jurisdiction (Pet.App. A- 1).

REASON FOR GRANTING THE WRIT

THE DECISION OF THE COURT BELOW WHICH COMMINGLES THE FIFTH AND SIXTH AMENDMENT RIGHTS TO COUNSEL AND HOLDS THAT INVOCATION OF THE SIXTH AMENDMENT RIGHT AUTOMATICALLY TRIGGERS FIFTH AMENDMENT PROTECTIONS WITH REGARD TO UNRELATED OFFENSES, IS AN ISSUE FOR WHICH THIS COURT HAS ALREADY GRANTED CERTIORARI IN *McNEIL V. WISCONSIN, INFRA.*

The Third District Court of Appeal's analysis of whether a defendant's Fifth Amendment right to counsel for uncharged crimes arises automatically and simultaneously with his Sixth Amendment arraignment invocation is in direct conflict with this Court's decisions in *Edwards v. Arizona,* 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), *Maine v. Moulton,* 474 U.S. 159, 106 S.Ct. 477, 88 L.Ed.2d 481 (1985), *Arizona v. Roberson,* 486 U.S. 675, 108 S.Ct. 2093, 100 L.Ed.2d 704 (1988) and *Illinois v. Perkins,* — U.S. —, 110 S.Ct. 2394, 110 L.Ed.2d 243 (1990).

The Third District Court of Appeal quoted the *Michigan v. Jackson,* 475 U.S. 625, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986) holding that:

> [I]f police initiate interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid,

and found that Trody's waivers were invalid because the written acceptance of Sixth Amendment counsel at his arraignment constituted a simultaneous invocation of his

Fifth Amendment right to counsel as to any uncharged crime.

This holding is in direct conflict with *Illinois v. Perkins, supra,* which disapproves of the commingling of the Fifth and Sixth Amendment rights to counsel. This Court has explicitly stated:

> After charges have been filed, the Sixth Amendment prevents the government from interfering with the accused's right to counsel. *Moulton, supra,* at 176. In the instant case no charges had been filed on the subject of the interrogation, and our Sixth Amendment precedents are not applicable.

Perkins, 110 L.Ed.2d at 253. In *Perkins,* the defendant had been charged with and was awaiting trial on aggravated battery charges when he confessed to an unrelated murder to an undercover police agent.

There are two distinct rights to counsel involved when a defendant is interrogated by the police. One right is the Fifth Amendment right to counsel propounded by *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). The Fifth Amendment right to counsel is invoked whenever a defendant who is subjected to custodial interrogation affirmatively asserts his right to remain silent.

The second right to counsel is the guarantee of the assistance of counsel in criminal proceedings directly conferred by the Sixth Amendment. The Sixth Amendment right to counsel arises and attaches automatically after the initiation of adversarial judicial criminal proceedings, but is limited to the specific crimes for which the state has begun prosecution. *Brewer v. Williams,* 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977); *Kirby v. Illinois,* 406 U.S. 682, 688-689, 92 S.ct. 1877, 1881, 32 L.Ed.2d 411 (1972). In Florida,

this right attaches only after a formal charging document, either an indictment or information, is filed. Article I, Section 16, Florida Constitution.

The foregoing distinctions have been recognized consistently in numerous decisions of this Court. In *Maine v. Moulton, supra,* this Court held that the right to counsel under the Sixth Amendment prohibited the admission of statements elicited from a defendant by a government informant when the statements related to the charge upon which the defendant had been indicted. However, this Court specifically noted that the rule being promulgated in *Moulton* would be otherwise if the statements elicited related to a different charge:

> [T]o exclude evidence pertaining to charges as to which the Sixth Amendment right to counsel had not attached at the time the evidence was obtained, simply because other charges were pending at that time, would unnecessarily frustrate the public's interest in the investigation of criminal activities.

Moulton, 474 U.S. at 180. Consistent with the foregoing policy statements, the Court held:

> Consequently, incriminating statements pertaining to pending charges are inadmissible at the trial of those charges, notwithstanding the fact that the police were also investigating other crimes, if, in obtaining this evidence, the State violated the Sixth Amendment by knowlingly circumventing the accused's right to the assistance of counsel.[16]

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16 Incriminating statements pertaining to other crimes, as to which the Sixth Amendment right has not yet attached, are, of course, admissible at a trial of those offenses.

Moulton, 474 U.S. at 180, n. 16.

In *Edwards v. Arizona, supra,* this Court first recognized that when a suspect invokes his Fifth Amendment right to counsel during a custodial interrogation, interrogation must cease until counsel has been made available or until the suspect himself initiates further communication with police. This principle was later applied in *Michigan v. Jackson, supra,* to an invocation of the Sixth Amendment right to counsel. Thus, the *Jackson* Court found that invoking counsel at arraignment triggers the *Edwards* rule only for the charged crime. In *Arizona v. Roberson, supra,* this Court established that a Fifth Amendment invocation of counsel during custodial interrogation precluded further questioning not only on the offense that was the subject of the interrogation, but on other offense. However, this Court explicitly rejected any notion that its holding was based on the Sixth Amendment right to counsel:

> Following *Massiah v. United States,* 377 U.S. 201, 207, 12 L.Ed.2d 246, 84 S.Ct. 1199 (1964), we recognized, though, that the continuing investigation of uncharged offenses did not violate the defendant's Sixth Amendment right to the assistance of counsel.

Roberson, 486 U.S. at 685.

Thus, this Court's analysis in both *Jackson* and *Roberson* has not overruled *Moulton* on the issue. On the contrary, this Court has reaffirmed *Moulton* in *Moran v. Burbine,* 475 U.S. 412, 431, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986):

> [L]ooking to the initiation of adversary judicial proceedings, far from being mere formalism, is fundamental to the proper application of the Sixth Amendment right to counsel. [In *Moulton*] we considered the constitutional implications of a

> surreptitious investigation that yielded evidence pertaining to two crimes. For one, the defendant had been indicted; for the other, he had not. Concerning the former, the Court reaffirmed that after the first charging proceeding the government may not deliberately elicit incriminating statements from an accused out of the presence of counsel...The Court made clear, however, that the evidence concerning the crime for which the defendant had not been indicted — evidence obtained in precisely the same manner from the identical suspect — would be admissible at a trial limited to those charges.

Therefore, reading *Moulton* in conjunction with the *Jackson* and *Roberson* decisions, the court below overstepped the limitations of the *Edwards* rule by holding that Trody's acceptance of Sixth Amendment counsel at his arraignment constituted a simultaneous invocation of his Fifth Amendment right to counsel for any future charged crime. The lower court incorrectly found that Trody's Fifth Amendment rights were interfered with despite the fact that the interrogation concerned uncharged, undiscovered crimes.

This Court is presently addressing a similar issue, having granted certiorari in *State v. McNeil,* 454 N.W.2d 742 (Wis. 1990) *cert. granted, McNeil v. Wisconsin,* — U.S. —, 111 S.Ct. 340, 112 L.Ed.2d 305 (1990). In *McNeil,* the Wisconsin Supreme Court considered whether a defendant's appearance with counsel at arraignment on one charge simultaneously prohibited further interrogation by the police about any other uncharged offenses. The Wisconsin Supreme Court found that *Roberson* did not mandate that an invocation of a Sixth Amendment right to counsel on one offense, ipso facto activated the *Edwards* rule with reference to interrogation on uncharged offenses.

The facts of the instant case not only present the issue before this Court in *McNeil, supra,* but also contain a new twist. An additional feature of this case is that the Respondent, at his arraignment, signed a form document which states that he is invoking his Sixth Amendment right and desires the presence of the public defender, "before anybody talks to me about any matters relating to this case or any criminal charge pending or contemplated." The Petitioner submits that such language should not result in a different conclusion than in *McNeil, supra.*

The notion that a right to counsel can be effected under *Edwards* for uncharged, unspecified crimes which may be "contemplated" by merely signing a form during judicial proceedings and prior to any custodial interrogation, runs contrary to the simple bright line test envisioned by *Edwards.* How will it be determined whether an uncharged crime is being "contemplated" by the police? Does a mere investigation of an offense result in official "contemplation" of charging the defendant with it? Or would the police have to first evince some likelihood of charging the defendant with that offense before it is deemed "contemplated?" And what about situations which are not even "contemplated" such as the instant case, where the police are not even aware of the relationship between the defendant and the crime? Such a concept creates endless shades of gray which would baffle even the most diligent and scholarly police officer. Such a concept deprives the police of the level of simple certainty necessary to make the *Edwards* rule viable.

Other practical problems ensue from the above effort to assert a commingled right to counsel under *Edwards* for crimes for which one is not in custody. The assertion of a right to counsel under *Edwards* needs to be effectively communicated. How are police investigating an unrelated offense reasonably to be expected to know that during judicial proceedings in the prior, unrelated offense, the defen-

dant executed such a document? Numerous possibilities exist. If no police officers are present at the arraignment, as is the norm, no one within any police department would be aware that such a document was ever signed. Must the police maintain a permanent presence at all judicial proceedings to monitor the signing of such forms during the proceedings? Efforts to ascertain whether such a form is ever signed can also easily prove unfruitful. Even if an officer were required to shoulder the additional burden of going to the courthouse prior to an interrogation, recently signed documents may not be in a court file, depending on the time and place of actual filing by the defendant or his counsel. *See, e.g. Delaware v. Alston,* 559 A.2d 304 (Del. 1989) ("...The assertion of the right to counsel must be conveyed to someone, usually an agent of the state, who would otherwise seek to question the suspect in the adversary or investigative process." Alston had signed an invocation of counsel form indicating that he did not want to speak with police officers. The form was contained in the public defender's office files which were available to the warden, if the latter sought the information. The Delaware court held, "[e]ven though it appears that Alston attempted to interdict further communication with the police by executing the invocation of counsel form, its mere availability to a custodial officer, under the circumstances here present, does not constitute notice to those state agents charged with further investigation.") If a defendant is currently incarcerated on a dozen unrelated offenses, must the police investigating a new offense examine every one of those prior court files before questioning the defendant on the new offense, despite the lack of any prior custodial interrogation or the existence of a written waiver? And does the invocation continue for an indefinite length of time, preventing a police officer from interrogating a defendant for ten, twenty or thirty years while he is incarcerated? The absurdities and perhaps impossibilities inherent in an endless array of such scenarios

effectively demonstrates why an assertion of a commingled right to counsel during a judicial proceeding and without any reference to what occurred during prior custodial interrogation(s), if any, should not be deemed to carry over to unrelated offenses.

Thus the acceptance of certiorari review in the instant case would serve not merely to reiterate the principles at stake in *McNeil,* but would extend beyond that case. It would also address the significance of written documents, such as the one here, which purport to assert a hybrid right to counsel in the future, *ad finitum,* for unrelated cases.

CONCLUSION

Based on the foregoing reasons and authorities cited herein, the Petitioner THE STATE OF FLORIDA respectfully requests that this Court grant its Petition for a Writ of Certiorari to the Supreme Court of Florida.

Respectfully submitted,

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No. _____

IN THE

Supreme Court of the United States

October Term, 1990

THE STATE OF FLORIDA,

Petitioner,

vs.

JOSEPH TRODY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

APPENDIX

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Notice of Defendant's Invocation of the Right to Counsel dated May 26, 1988 . . . . . A-11

Supreme Court of Florida

FRIDAY, DECEMBER 7, 1990

CASE NO. 76,134

DISTRICT COURT OF APPEAL
3RD DISTRICT NO. 89-93

STATE OF FLORIDA,

Petitioner,

v.

JOSEPH TRODY,

Respondent.

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla.R.App.P. 9.330(d).

OVERTON, Acting C.J., EHRLICH, BARKETT and GRIMES JJ., concur
MCDONALD, J., dissents

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT
COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT
JANUARY TERM,
A.D. 1990

JOSEPH TRODY,

Appellant,

vs.

CASE NO. 89-93

THE STATE OF FLORIDA,

Appellee.

Opinion filed March 6, 1990

An Appeal from the Circuit Court for Dade County, S. Peter Capua, Judge.

Bennett H. Brummer, Public Defender, and Christine S. Dahl, Special Assistant Public Defender, for appellant.

Robert A. Butterworth, Attorney General, and Monique T. Befeler, Assistant Attorney General, for appellee.

Before BARKDULL, COPE, and GERSTEN, JJ.

GERSTEN, Judge.

Appellant, Joseph Trody, appeals his conviction and sentence for nineteen counts of burglary and twenty counts of grand theft. Appellant pled nolo contendere to the counts, reserving his right to appeal the denial of his motion to suppress. We reverse.

On May 25, 1988, appellant was arrested and charged with two counts of burglary and two counts of grand theft after pawning items taken during two separate burglaries. At the time of his arrest, appellant indicated to detectives that he was willing to talk to them about other burglaries he had committed. Apparently, the detectives did not avail themselves of the appellant's offer to talk.

On May 26, 1988, appellant was appointed counsel and signed an invocation of his right to counsel. Later that day, appellant was charged with two or more burglaries. These new charges resulted from a comparison of appellant's fingerprints to those found at the scene of other burglaries.

The next day, on May 27, 1988, appellant appeared before the court for a bond hearing on the new charges. Appellant was again appointed counsel and invoked his right to counsel.

On May 31, 1988, the detectives initiated contact with appellant in jail, and charged him with two additional charges of burglary and grand theft. At that time, appellant signed a waiver of his constitutional rights and told detectives that he had committed other burglaries. The detectives, however, again chose not to talk to appellant.

On June 1, 1988, appellant appeared before the court on the May 31, 1988 charges. Appellant again invoked his written right to an attorney at this appearance.

On June 2, 1988, in spite of appellant's three written invocations of his right to an attorney and his being represented by counsel, the detectives again initiated contact with appellant in jail. Appellant signed a waiver of his constitutional rights and the detectives interrogated him. Appellant told detectives about other burglaries he had committed. The detectives then drove appellant around the

city so that appellant could point out the locations of these other burglaries.

As a result of the information he gave the detectives, appellant was charged with, and convicted of, nineteen additional counts of burglary and twenty additional counts of grand theft. It is these additional thirty-nine convictions and sentences that appellant appeals.

Appellant asserts that the court should have suppressed the evidence regarding the thirty-nine additional charges because the evidence was obtained from him after his invocation of his right to counsel. The State contends that appellant's waivers, signed after the invocation of the right to counsel, amount to a voluntary waiver of the right to counsel. We agree with appellant.

In *Edwards v. Arizona,* 451 U.S. 476, 101 S.Ct. 1880, 68 L.E.2d 378 (1981), the United States Supreme Court set a bright-line standard for police contact with a defendant after the defendant has invoked his right to counsel.

> [A]n accused, ... having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.

Edwards v. Arizona, 451 U.S. at 484-485. The bright-line rule in *Edwards* is not only applicable where the invocation of the right to counsel is made directly to police, but also where the right is invoked during a judicial proceeding. In *Michigan v. Jackson,* 475 U.S. 625, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986), the United States Supreme Court held:

> [I]f police initiate interrogation after a defendant's assertion, at an arraignment or similar proceed-

> ing, of his right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid.

Michigan v. Jackson, 475 U.S. at 636.

In *Arizona v. Roberson,* 486 U.S. 675, 108 S.Ct. 2093, 100 L.Ed.2d 704 (1988), the Supreme Court addressed waivers signed after the invocation of the right to counsel. The Supreme Court held that where the waiver is done "at the authorities behest, and not at the suspect's own instigation," such a wavier is not purely voluntary. *Arizona v. Roberson,* 108 S.Ct. at 2097.

The record shows that appellant neither telephoned the detectives nor in any way contacted them. Rather, the detectives initiated each contact with appellant while appellant was being held in jail. Further, it was not necessary for the detectives to have contact with appellant in order to charge him with the additional cases. The arrest forms could have routinely been left at the jail without the detectives' direct contact with appellant.

Accordingly, we reverse appellant's convictions and sentences in case numbers 88-17832, 88-17833, 88-19144, 88-19145, 88-19147, 88-19148, 88-19149, 88-19150, 88-19151, 88-19152, 88-19153, 88- 19154, 88-19155, 88-19157, 88-19160, 88-19161, 88-19162, and 88- 16163.[1]

Reversed.

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1 Appellant does not appeal, and we do not address, his convictions and sentences on case numbers 88-17834, 88-17703, 88-17195, 88-17174, 88-17049, and 88-17050.

IN THE CIRCUIT COURT OF
THE 11TH JUDICIAL CIRCUIT,
IN AND FOR DADE COUNTY,
FLORIDA

CRIMINAL DIVISION

CASE NO. 88-17049, 17050,
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19151, 19152, 19153, 19154,
19155, 19157, 19160, 19161,
19162, 19163

STATE OF FLORIDA,

Plaintiff,

vs.

JOSEPH TRODY,

Defendant.

The above-entitled case came on for hearing before the Honorable Judge Capua, at the Dade County Courthouse, Miami, Florida, on November 10, 1988, commencing on or about 2:00 p.m.

****

RUTH SOLLY
On behalf of the Plaintiff.

JUAN ELSO
On behalf of the Defendant.

****

(Thereupon the following proceedings were had in open court.)

****

THE COURT: Joseph Trody, the motion to suppress is denied.

I would like to make a few statements for the record, that I find it notwithstanding, the defendant on three different occasions invoked the indicative right to counsel form, and to communicate with the police without assistance of counsel. The court relies on Patterson (Phonetic) versus Ali, 108 Supreme Court 2389.

Further, the defendant's confession and willingness to talk to them, on May 21st, and on May 31 and again, June 2nd. When the defendant took the officers out on location.

Further, the defendant at no time requested an attorney at the time of the various interviews.

The court is satisfied that the defendant executed and initiated a waiver of rights form without cohersion or promise. Based on Edwards versus Arizona, 451 U.S. 477.

The court further finds the defendant had capability to have counsel present, but didn't find —

The officers were not compelled to seek out defendant's counsel, where the defendant knew and voluntarily knew and manifestly desired to talk, based on Smith, 342 Southern Second 497. Waterhouse (Phonetic) that's at 407, 301 Southern Second.

No promises made to the defendant to induce him to talk.

Further, based on Prefer (Phonetic) versus State, 44 Southern Second 39. State versus Williams, 358, Southern Second, 1094. Bush versus State, 461 Southern Second 936.

This decision covers the 5th and 6th Amendment right to the United States Constitution.

The court also — the court also, based it's decision on the copious notes that were taken by the court in addition to those documents that were introduced into evidence. Both

memorandums of law and the following cases that were submitted by the State and also by the Defense.

Patterson versus Illinois, which I already cited. Preacher versus State, already cited.

Lucette (Phonetic) versus State, 449 Southern Second 803, Kanady, K-A-N-A-D-Y, versus State, 420 Southern Second 723. Langue (Phonetic) versus State, 517 Southern Second 664.

Bush versus State, 46D1 Southern Second 936

Read the criminal law report, dated June 15th, 1988.

Moran (Phonetic) versus Burbin (Phonetic), 106 Supreme Court 1135 and Valley versus State 474 Southern Second 796.

These are also cases that were submitted by the defense. I failed to delineate them, but — and the Waterhouse case, which I already cited.

The Fillinger (Phonetic) versus — 349 Southern Second 714. Brody versus State, 356 Southern Second 849. Williams versus State, 441 Southern Second 653 and Brown versus State, 413 Southern Second 414.

Now, I would like to see the attorneys side bar.

MR. ELSO: Before, I want to ask a question. I didn't hear - - Your Honor is not relying on Michigan versus Jackson — I think, which was a Supreme Court case by my main point of contention.

THE COURT: I have read that case. I am surprised I didn't quote it.

I have read that case.

MR. ELSO: Okay.

THE COURT: You relied on that case and I didn't rely on it.

MR. ELSO: The court indicated — you initiated contact — the court implying he made the contact on May 31 and June 2nd, that he initiated, or initially made, the 25th —

THE COURT: Initially on May 25th.

MR. ELSO: May 25th, before he had an attorney. Is the court finding he initiated the conversation May — June 2nd?

THE COURT: I read into the — read what I said —
Manifested and initiated his willingness to talk on May 25th.

MR. ELSO: That was prior to counsel? I want to make sure the court is aware — May 21, June 2nd, the statements in confession, we were offering to suppress or not moving to suppress the statements on May 25th. On May 31 and June 2nd. I want the record to be reflected that he was incarcerated at that time.

THE COURT: May I see —

(Thereupon, other proceedings were had, unrelated to this matter, after which the following proceedings were had).

THE COURT: For the Trody case, additional cases —
Arizona versus Roberson, Edwards versus Arizona.
Arizona versus Roberson, cited at 108 Southern Second 2093. Edwards versus Arizona, 451, US47768 southern Second 378. United States of America.
Miguel A. Espinoza versus W. Fairman. United States Court of Appeals, 7 Circuit, 813 Southern Second 117.
Albert L. Wilson versus Edward Murray. United State Court of Appeals, 4th Circuit.
Brewer versus Williams. 430 US 387 — 51 LED Second — 424.
Long versus State of Florida, Supreme Court of Florida, 510 Southern Reporter, Second Series.

Edward Mills versus State of Florida, District Court of Appeals of Florida, Fourth District. October 3rd, 1975. 32 Southern Reporter, second series, page 14.

Alvin Willie Fullard, F-U-L-L-A-R-D versus State of Florida. District Court of Appeals of Florida, First District, December 20, 1977, cited at 351 Southern Second 1271.

Foreman, F-O-R-E-M-A-N versus State, cited at Florida APP 400 Southern Second 1047, District Court of Appeals of Florida, First District.

Henthorn versus State, H-E-N-T-H-O-R-N versus State. Cited Florida APP, 409 Southern Second 1081, District Court of Appeals of Florida, Second District.

Michigan petitioner versus Jackson, Robert Bernard Jackson. Michigan versus Rudy Blondell, M-I-C-H-I-G-A-N versus B-L-A-D-E-L, 106 Supreme Court Reporter numbers 841531, 841539.

Larry Edward — Brickell Bank, B-R-I-C-K-E-L-B-A-N-K versus State of Florida, Appellee. Numbers 81871, District Court of Appeals of Florida, Second District 407 Southern Reporter, Second Series. 3771 Southern Reporter, Second Series.

Joyce Bernice Hawthorne, H-A-W-T-H-O-R-N-E. State of Florida, appellee, District Court, number 228, District Court of Appeals of Florida, First District, December 7th, 1979. Southern Reporter, Second Series.

S-H-A-F-I versus State. 377 Southern Second 787.

Brewer versus Williams.

Robert Long, L-O-N-G versus State of Florida.

(Thereupon, the proceedings were concluded.)

IN THE CIRCUIT COURT OF
THE ELEVENTH JUDICIAL
CIRCUIT, IN AND FOR DADE
COUNTY, FLORIDA

CASE NO. 88-17049-50

JUDGE: CAPUA

THE STATE OF FLORIDA,

Plaintiff,

vs.

TRODY, JOSEPH H.,

Defendant.

NOTICE OF DEFENDANT'S INVOCATION OF THE RIGHT TO COUNSEL

I, Joseph H. Trody, hereby invoke and exercise my right to counsel pursuant to the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 9,12 and 16 of the Florida Constitution and the case law thereunder. That is to say that I desire to have my attorney, the Public Defender, present before and during any questioning of, interviewing of, and/or conversations with me by any police official and/or agents thereof, any prosecutors and/or agents thereof, any judicial officer and/or agents thereof. I hereby announce that I desire my attorney present before anybody talks to me about any matters relating to this case or any criminal charge pending or contemplated. This notice is not intended to be, and in fact is not, an admission of guilt or criminal liability and should not be interpreted to give rise to any inference of guilt. After being fully advised of my constitutional and statutory rights by my attorney, I am signing this notice upon his advice.

Furthermore, I hereby state that at no time in the future do I or will I waive, (i.e. give up), my right to have my

attorney present at all times prior to anyone trying to secure from me a waiver of any of my constitutional and statutory rights.

Notice is hereby given by me that should *any* government official and/or agent thereof fail to respect and honor this notice and invocation of rights, the undersigned will litigate and seek sanctions and damages for said violation of constitutional and statutory rights. And I specifically request that employees of the Dade County Jail and the Dade County Department of Corrections take notice of and honor this request.

I HEREBY CERTIFY that a true and correct copy of the foregoing was served upon the Office of the State Attorney, 1351 N.W. 12 Street, Miami, Florida this 26th day of May, 1988.

/s/ Joseph H. Trody
Defendant

ORIGINAL

FILED

OFFICE OF THE CLERK

SUPREME COURT OF THE UNITED STATES

[redacted],

Petitioner,

THE STATE OF FLORIDA,

Petitioner,

[redacted] TRODY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF OF RESPONDENT IN OPPOSITION

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BEST COPY AVAILABLE

15pp

QUESTION PRESENTED

WHETHER THE POLICE ARE PROHIBITED FROM INITIATING INTERROGATION ON UNCHARGED OFFENSES WHERE THE ACCUSED HAS REMAINED IN CONTINUOUS CUSTODY AFTER REQUESTING AT A JUDICIAL PROCEEDING THAT HIS ATTORNEY BE PRESENT AT ANY QUESTIONING

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454 N.W.2d 742 (Wisc. 1990), cert. granted,
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U.S. ex rel. Espinoza v. Fairman,
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Art. I, § 9, 12 and 16, Fla. Const 6

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III. STATEMENT OF THE CASE

On May 25, 1988, Joseph Trody was arrested and charged with two counts of burglary and two counts of grand theft after pawning items taken during two separate burglaries. At the time of his arrest, Trody indicated to the detectives that he was willing to talk to them about other burglaries he had committed. The detectives did not avail themselves of Defendant's offer to talk. (Pet. App. 3).

On May 26, 1988, Trody was appointed counsel and signed an invocation of his right to counsel. In that document, Trody stated that he "desire[d] to have [his] attorney, the Public Defender, present before and during any questioning of, interviewing of, and/or conversations with me by any police official . . . . about any matters relating to this case or any criminal charge pending or contemplated." (Pet. App. 11). Later that day, he was charged with two more burglaries. These new charges resulted from a comparison of Trody's fingerprints to those found at the scene of other burglaries. (Pet. App. 3).

The next day, on May 27, Trody appeared before the Court for a bond hearing on the new charges. He was again appointed counsel and again invoked his right to counsel. (Pet. App. 3).

On May 31, 1988, the detectives initiated contact with Trody, who had remained in jail, and charged him with two additional

charges of burglary and grand theft. At that time, Trody signed a waiver of his constitutional rights and told detectives that he had committed other burglaries. The detectives, however, again chose not to talk to Trody. (Pet. App. 3).

On June 1, 1988, Trody appeared before the Court on the prior day's charges. He again invoked in writing his right to an attorney. (Pet. App. 3).

On June 2, 1988, despite Trody's three written invocations of his right to counsel and his being represented by counsel, the detectives again initiated contact with Trody in jail. (Pet. App. 3). Trody signed a waiver of his constitutional rights and the detectives interrogated him. Trody told them about other burglaries he had committed. The detectives then drove Trody around the city so that he could point out the locations of these other burglaries. (Pet. App. 3).

While in jail, Trody neither telephoned the detectives nor in any way contacted them. Rather, the detectives initiated each contact with Trody while he was being held in jail. It was not necessary for the detectives to have contact with Trody in order to charge him with the additional cases. The arrest forms could have routinely been left at the jail without the detectives' having had direct contact with Trody. (Pet. App. 5).

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As a result of the information he gave to the detectives, Trody was charged with, and convicted of, nineteen additional counts of burglary and twenty additional counts of grand theft. (Pet. App. 4). Trody appealed those thirty-nine convictions and sentences after his motion to suppress the evidence regarding them was denied. (Pet. App. 2).

On March 6, 1990, the District Court of Appeal for the Third District of Florida reversed Trody's convictions and sentences upon a holding that the police had improperly initiated interrogation after Trody's assertion of his right to counsel. (Pet. App. 2-5). Accordingly, the waivers procured by the police of Trody's constitutional rights for those police-initiated interrogations were invalid. In so holding, the Third District Court of Appeal applied the bright-line rule that was enunciated in Edwards v. Arizona, 451 U.S. 476, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), and extended to interrogations about unrelated charges in Arizona v. Roberson, 486 U.S. 675, 108 S.Ct. 2093, 100 L.Ed.2d 704 (1988). (Pet. App. 4-5).

The State then unsuccessfully petitioned the Florida Supreme Court for review. The Court's denial of the petition was entered on December 7, 1990. (Pet. App. 1). The State's petition to the United States Supreme Court followed.

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IV. SUMMARY OF ARGUMENT

This Court should deny the State of Florida's Petition for a Writ of Certiorari to the Florida Supreme Court. Unlike State v. McNeil, 454 N.W.2d 742 (Wisc. 1990), cert. granted, McNeil v. Wisconsin, ___ U.S. ___, 111 S.Ct. 340, 112 L.Ed.2d 305 (1990), the District Court of Appeal of Florida correctly held that the defendant's invocation of his right to counsel prohibited the police from thereafter initiating interrogation about unrelated offenses. In so holding, the District Court of Appeal properly applied the bright-line rules laid down by this Court in Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981); Michigan v. Jackson, 475 U.S. 625, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986); and Arizona v. Roberson, 486 U.S. 675, 108 S.Ct. 2093, 100 L.Ed.2d 704 (1988). Accordingly, there is no need for this Court to exercise its discretionary jurisdiction to review the decision below.

V. ARGUMENT

THIS COURT SHOULD NOT GRANT CERTIORARI BECAUSE THE DECISION BELOW IS CORRECT.

This Court should decline to exercise its discretionary jurisdiction to review the decision below, in which the District Court of Appeal of Florida correctly held that because the Defendant, Joseph Trody, had invoked his right to counsel, the waivers of that right which the police secured during police-initiated interrogation on unrelated charges were invalid. In so

holding, the District Court of Appeal correctly applied this Court's bright-line rule enunciated first in Edwards v. Arizona, 451 U.S. 477, and later extended in Michigan v. Jackson, 475 U.S. 625, and Arizona v. Roberson, 486 U.S. 675.

In Edwards v. Arizona, this Court held that

> when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. . . . [A]n accused, ... having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges or conversations with police.

Edwards v. Arizona, 451 U.S. 477, 484-85, 101 S.Ct. 1880, 1884-85, 68 L.Ed.2d 378, ____ (1981) (emphasis added; footnote omitted).

Then, in Michigan v. Jackson, the Court extended the rule to the invocation of counsel at arraignment:

> [I]f police initiate interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid.

Michigan v. Jackson, 475 U.S. 625, 636, 106 S.Ct. 1404, 1411, 89 L.Ed.2d 631, ____ (1986).

Finally, in Arizona v. Roberson, the Court extended the Edwards rule to prohibit police-initiated interrogation on unrelated

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charges after a suspect requests counsel. The Court explained its rationale:

> As a matter of law, the presumption raised by a suspect's request for counsel -- that he considers himself unable to deal with the pressures of custodial interrogation without legal assistance -- does not disappear simply because the police have approached the suspect, still in custody, still without counsel, about a separate investigation.

Arizona v. Roberson, 486 U.S. at ___, 108 S.Ct. at 2099, 100 L.Ed.2d at ___.

Here, the Defendant invoked his right to counsel on three separate occasions[1/], each time he was arraigned on new charges. Twice, the police initiated contact with the Defendant while in jail and while represented by counsel, and on the second instance, obtained from the Defendant the evidence used to charge him with and convict him of an additional 19 counts of burglary and 20 counts of grand theft. The police simply crossed the bright-line rule of Roberson and Edwards. Accordingly, the District Court of Appeal correctly ruled that the evidence thus obtained should have been suppressed and reversed the judgments of conviction and sentences based thereon.

The State of Florida argues that this Court should review the District Court of Appeal's decision because certiorari has already

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1/ Counsel was invoked pursuant to the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§ 9, 12, and 16 of the Florida Constitution. (Pet. App. 11). Article I, § 9, specifically concerns the right against self-incrimination. (Pet. at 3).

been granted in State v. McNeil, 454 N.W.2d 742 (Wisc. 1990), cert. granted, McNeil v. Wisconsin, ___ U.S. ___, 111 S.Ct. 340, 112 L.Ed. 305 (1990). However, this Court need not grant certiorari in this case because, unlike State v. McNeil, the decision below is correct. See Rule 10.1(b), Rules of the Supreme Court.

First, the Defendant did, in fact, invoke his right against self-incrimination and, as a result, his Fifth Amendment rights attached as of May 26, 1988 -- well before the questioning at issue.

Second, when an accused requests at an arraignment or similar judicial proceeding that an attorney be present at any police questioning, the police are prohibited from initiating interrogation on unrelated offenses. Edwards; Roberson. The Wisconsin Supreme Court in State v. McNeil erroneously concluded the opposite -- that a request for counsel at an arraignment invokes only the Sixth Amendment right to counsel, not that of the Fifth Amendment, and thus does not preclude police-initiated interrogation on unrelated offenses. State v. McNeil, 454 N.W. 2d at 743-745. The court in McNeil improperly limited the scope of Edwards' application depending upon which constitutional amendment was expressly invoked by the accused as the basis for his request for counsel. State v. McNeil, 454 N.W. 2d at 746.

Whether the defendant's exercise of his right to counsel is based on the Fifth Amendment or the Sixth Amendment should not make

a difference in the scope of the application of that right. Michigan v. Jackson, 478 U.S. at 631, 106 S.Ct. at 1408 (rejecting argument that differences in legal principles underlying Fifth Amendment preclude application of Edwards rule to Sixth Amendment claim). This Court has repeatedly recognized that there exists a danger of "subtle compulsion" when a defendant who requests the assistance of an attorney is nevertheless subjected to further interrogation initiated by the police while remaining in custody. Edwards, 451 U.S. 477; Michigan v. Mosley, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975); Roberson, 486 U.S. 675; Michigan v. Jackson, 475 U.S. 625.

That danger is present regardless of the particular constitutional provision the defendant cites as the basis for his invocation of the right to counsel. As this Court stated so clearly in Michigan v. Jackson:

> Edwards is grounded in the understanding that 'the assertion of the right to counsel [is] a significant event," and that 'additional safeguards are necessary when the accused asks for counsel.' We conclude that the assertion is no less significant, and the need for additional safeguards no less clear, when the request is made at an arraignment and when the basis for the claim is the Sixth Amendment.
>
> 476 U.S. at 636, 106 S.Ct. at 1411 (quoting Edwards, 451 U.S. at 485, 484, 101 S.Ct. at 1885, 1884).

In contrast to the State's argument in its Petition, the reasoning of Edwards applies with even greater force to requests for counsel based on the Sixth Amendment, and there is no reason that the police should be permitted to initiate interrogation on unrelated

offenses after an accused has asserted the right to counsel at an arraignment or similar proceeding. Michigan v. Jackson, 475 U.S. at 636, 106 S.Ct. at 1411.

As this Court stated in Roberson, 108 S.Ct. at 2099:

> As a matter of law, the presumption raised by a suspect's request for counsel -- that he considers himself unable to deal with the pressures of custodial interrogation without legal assistance -- does not disappear simply because the police have approached the suspect, still in custody, still without counsel, about a separate investigation. . . . This discomfort is precisely the state of mind that Edwards presumes to persist until the suspect himself initiates further conversation about the investigation; unless he otherwise states, there is no reason to assume that a suspect's state of mind is in any way investigation-specific.

Here, the police repeatedly initiated interrogation even though Trody repeatedly requested that counsel be present at any questioning. And, Roberson having settled the debate about whether a request for counsel precludes police-initiated interrogation on unrelated charges,[2/] the District Court of Appeal correctly held

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[2/] There can be no doubt that this is what Roberson held. See Butler v. Aiken, 846 F.2d 255 (4th Cir. 1988) (Edwards distinguished on the basis that interrogation related to unrelated crime), on reconsideration, 864 F.2d 24, 25 (1989) (Butler's conclusion "cast into immediate and serious doubt" by Roberson), aff'd sub nom. Butler v. McKellar, ___ U.S. ___, 110 S.Ct. 1212, 108 L.Ed.2d 347 (1990) (new rule announced in Roberson not applicable to collateral review); see Illinois v. Perkins, ___ U.S. ___, ___, 110 S.Ct. 2394, 2399, ___ L.Ed.2d ___, ___ (1990) ("if respondent [who was in custody when questioned] had been formally charged on the unrelated charged and had invoked his Sixth Amendment right to counsel, he may have a Sixth Amendment challenge to the admissibility of these statements") (Brennan, J., concurring).

that the waiver of the Defendant's constitutional rights obtained by the police was ineffective and the evidence obtained in the improper interrogation should have been suppressed.

Finally, the State of Florida contends that the decision below should be reviewed because it directly conflicts with Illinois v. Perkins, ___ U.S. ___, 110 S.Ct. 2394, 110 L.Ed.2d 243 (1990), which the State characterizes as having "disapprove[d] of the commingling of the Fifth and Sixth Amendment rights to counsel." Petition for Writ of Certiorari, at 8. Once again, the State has mischaracterized a case in an effort to demonstrate conflict. Illinois v. Perkins concerned only the question of whether Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), applied to the questioning of an incarcerated suspect by an undercover agent. There was no request for counsel, either prior to or during the questioning. Thus, Illinois v. Perkins does not apply to the decision below, and there is no conflict.

VI. CONCLUSION

For the foregoing reasons, this Court should deny the Petition for a Writ of Certiorari to the Supreme Court of Florida.

Respectfully submitted,

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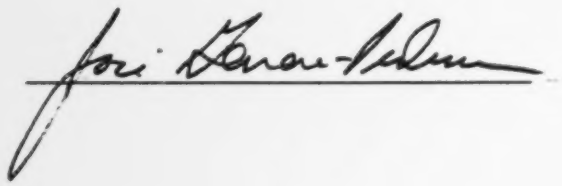
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct of the Respondent's Brief was mailed to Robert A. Butterworth, Attorney General, The Capitol, Tallahassee, Florida 32301; Michael J. Neimand, Esq., Assistant Attorney General, and Monique T. Befeler, Assistant Attorney General, Department of Legal Affairs, Suite N-921, 401 N.W. Second Avenue, Miami, Florida 33128, the 5th day of April, 1991.



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